IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR
JUDGMENT
D.B. Civil Special Appeal (Writ) No.466/93
Modern Educational and Cultural Society
Vs.
Nizam & Ors.

D.B. Civil Special Appeal (Writ) No.479/93
Modern Educational and Cultural Society
Vs.
Jaipur Development Authority & Anr.

Date of Judgment : 4th April, 2007

**HON'BLE THE CHIEF JUSTICE MR.S.N.JHA**
**HON'BLE MR.JUSTICE MOHAMMAD RAFIQ**

Shri K.K. Sharma for appellant.
Shri Sanjay Pareek for respondent-JDA.

**(Per – Hon'ble Mr. Mohammad Rafiq, J.),**

**REPORTABLE**

These two special appeals have been filed by the appellant Modern Educational and Cultural Society against the common judgment of the learned Single Judge dated 12.4.1993 passed in two writ petitions, one of which was filed at the instance of Nizam and Ors. and another by the appellant Modern Educational and Cultural Society. Dispute

pertains to allotment of a piece of land admeasuring 4877 sq. yards (4077.8 sq. mtrs.) by Jaipur Development Authority (in short `the JDA') in favour of the appellant by its order dated 6.9.89 in Nu-Lite Colony, adjoining the Tonk Road, Jaipur which has been developed by the Nu-Lite Housing Cooperative Society (in short- `the Housing Society'). The writ petition filed by Nizam and Ors. was in fact a letter petition which was registered as a public interest litigation (Writ Petition No.332/90) whereas the writ petition filed by the petitioner-appellant was an off-shoot of the first writ petition. While in the writ petition filed by Nizam and Ors., challenge was made to the allotment of a land earmarked as an open space in the lay out plan of a housing colony proposed by the Housing Society. Second writ petition was filed by the appellant herein with the prayer that the

JDA be directed to handover possession of the land alloted to them and be restrained from allotting such land to any other person. Since the dispute pertains to the common piece of land, both the writ petitions were disposed of by the common judgment impugned herein.

The learned Single formulated a question of general importance for adjudication of the dispute which for the facility of the reference is reproduced hereunder:-

> “Whether an open space/spaces reserved as per approved scheme under Rajasthan Urban Areas (Sub-Division, Reconstruction and Improvement of Plots) Rules, 1975 could be allotted by Jaipur Development Authority to a private person / body for a school.”

The learned Single Judge by the impugned order ultimately held that the allotment of the land in dispute made by the

JDA in favour of the appellant for setting up a school was illegal being null and void and therefore the JDA was further restrained from making allotment of the land in question to any private person or body in future.

Though originally the judgment passed by the learned Single Judge was challenged by both, the appellant Modern Educational and Cultural Society and the Jaipur Development Authority by filing separate appeals but the JDA later decided to accept the judgment passed by the learned Single Judge and therefore withdrew the appeal. We are called upon to decide these two appeals filed against such common judgment deciding the two writ petitions referred to above.

We have heard Shri Kamlakar Sharma, learned counsel for the appellant and Shri Sanjay Pareek, learned counsel for the Jaipur Development Authority.

Shri Kamlakar Sharma, learned counsel

for the appellant has at the outset argued that the learned Single Judge committed an error of law in entertaining the writ petition on the basis of a postcard sent by a person whose whereabouts were not known and entertaining such letter petitions ultimately have the effect of adjudicating rights of a person. Unless the person sending the letter himself comes to the Court, such letter petition cannot be treated as public interest litigation. He argued that this petition was not bonafide because the Housing Society had made an application to the Minister of Housing and Urban Development Department for allotment of the very same land for the purpose of constructing a community hall and swimming pool and the Minister passed the order for making such allotment in favour of the Society without knowing about the fact

that the land had already been allotted to the appellant. When however the Minister came to know about the allotment made in favour of the appellant, the aforementioned order was cancelled. It was for this reason that the aforesaid public interest litigation was filed at the instance of the Housing Society. He argued that no element of public interest was involved in the present matter because establishment of a school could not in any manner act contrary to the public interest. On the contrary, setting up a school by itself is a public purpose. The petition could not be therefore treated as public interest litigation.

While referring to the lay out plan as originally proposed by the Housing Society to the JDA as also the plan which was finally approved by the JDA, Shri

Kamlakar Sharma argued that a perusal of the later plan would reveal that different five patches of the land were earmarked therein as facility areas without any specifications being made whether they shall be used as parks, gardens, lawns or children's play grounds etc. The land which was allotted to the appellant was also indicated only as a facility area. The impugned judgment however proceeds on the assumption that the land allotted to the appellant which was reserved as facility area was meant only for park, garden, lawn and children's play ground although there was no basis for such an assumption. In fact, four shops and thirteen plots were proposed over part of the land allotted to the appellant in the original lay out plan proposed by the Housing Society which is also indicative

of the fact that the land was never meant to be reserved for public park, garden, lawn or play ground etc. Shri Kamlakar Sharma argued that the Jaipur Development Authority Act, 1982 (for short `the Act') nowhere specifically provides for the definition of facility area though open space and public park have been included in the definition of `amenities' as given in Section 2(2) of the JDA Act, 1982. But the word `facility' has been used in the master plan which provides for the community facilities like educational, medical, recreational facilities etc. to be made available in various planning areas so as to achieve the object of the plan keeping in view the residential density, local character and future expansion. Educational facility being one of the facilities envisaged in the master

plan of the Jaipur City, no restricted meaning can be given to the word `facility area'. In other words, Shri Kamlakar Sharma sought to argue that facility area does not necessarily always mean public park or children's play ground but it can also include schools as educational facility.

Shri Kamlakar Sharma further argued that learned Single Judge has erred in holding that allotment of the disputed land in favour of the appellant had the effect of deviation from the plan and therefore such allotment could not be made unless the plan was revised under Rule 32 of the Rajasthan Urban Areas (Sub-division, Reconstitution and Improvements of Plots) Rules, 1975 (for short `the Rules of 1975'). He argued that there was no question of revision of the approved

plan for the simple reason that there was no deviation from the plan. While referring to Rule 13, 14 and 15 of the Rules of 1975, Shri Kamlakar Sharma argued that Rule 13 has provided for creating open spaces which are, as far as possible, to be uniformly located and provided but Rule 14 of the same Rules also provides for educational facilities such as nursery schools, primary schools and higher secondary schools. According to this rule, an area of approximately 180-240 sq. meters was required to be provided for setting up a nursery school to serve the population of 1500 person and an area of 360-480 sq. meters was to be provided for setting up a primary school to serve the population of 4000 persons. Size of a Secondary / Higher Secondary School for the population of around ten to twelve

thousand persons has been indicated in the said rule as approximately 750 sq. meters. Rule 15 further provides that any other facility that may be deemed necessary in an area shall be adequately provided as may be directed by the Trust from time to time.

Shri Kamlakar Sharma further argued that the learned Single Judge has erred in law in holding that area reserved for educational facility or any other facilities remains in the ownership of the developer. Once the lay out plan of the Housing Society is approved, the scheme has been formulated and the plots are sub-divided, the areas of roads and facilities cease to be in the ownership of the developer and the development of such facility areas or roads then can be made only by the Jaipur Development Authority.

He in this connection cited Rule 30(2) of the Rules 1975 which inter alia provides that as soon the date of approval of the sub-division by the trust, ownership of roads, parks and open spaces vests in the Trust. It should be noted that the Rules of 1975 were framed when Urban Improvement Trust was responsible for planned and integrated development of Jaipur City which has now been replaced by the Jaipur Development Authority with the State Legislature enacting and enforcing Jaipur Development Authority Act, 1982. The Jaipur Development Authority has adopted the Rules of 1975 to be applied for its purposes. It is submitted that when the JDA has made the allotment and charged premium / price of the land from the public, there was no basis for the learned Single Judge concluding that the land was

vested in the Housing Society. This finding of the learned Single Judge is contrary to the finding recorded by him elsewhere in the same impugned judgment where he held that after approval of the sub-division, the open lands and spaces vest in the JDA. The learned Single Judge further committed an error in distinguishing the lands reserved for Educational Facilities which were allotable and the lands which are dedicated to the public in general. According to Shri Kamlakar Sharma, no such distinction was permissible on true of interpretation of the Rules 1975 or the provisions of the Act. He further argued that the findings recorded by learned Single Judge that since there was already a school in the name of Prem Shanti Public School just opposite the land in question,

therefore the allotment of the subject land to the appellant was not required to be made, amounted to taking an erroneous view of the matter. He argued that existence of a very small school, such as Prem Shanti Public School, would hardly be just and responsible cause for cancellation of the allotment of the land made in favour of the appellant. Once when it was held that due to sub-division of the land, the open space stood vested in the JDA, it had all the legal competence to make the allotment. The learned Single Judge has further committed an error of law by holding that the allotment of the land to the appellant is contrary to Article 14 of the Constitution of India. Allotment of the land to the appellant was purely an administrative action and no malafides were alleged. In most of the

developed colonies of the City which have been either developed by the private housing societies or the JDA, the land for the schools have been allotted only in the facility areas. Instances of some such schools have been given to substantiate this. Learned Single Judge was not justified in holding that before making allotment of the disputed land to the appellant, an opportunity of hearing was required to be provided to the residents of the area and the developers of the colony. When the learned Single Judge himself held that the land upon sub-division stood vested in the JDA, there was no occasion for issuing any public notice and there was therefore also no question of violation of any of the principles of natural justice. The learned Single Judge was also not correct when he

held that the allotment of the disputed plot to the appellant would be contrary to intention of the legislature to safeguard health, safety and general welfare of the people of the locality. Setting up an educational institution can hardly be hazardous to public health or safety. Lastly but alternatively, Shri Kamlakar Sharma argued that when the appellant was allotted the land in dispute it had deposited a sum of Rs.4.5 lacs in the year 1988 and even if the allotment of the subject land was held to be questionable, instead of directing the JDA to refund the amount, the learned Single Judge ought to have directed for allotment of alternate piece of land on the price prevalent in the year 1988. He therefore prayed that the special appeals be allowed and the impugned judgment passed by the learned

Single Judge be set aside and the writ petition filed by the appellant be allowed in terms of the prayers contained therein and by restoring the allotment made in favour of the appellant, the JDA be directed to handover vacant possession of the land in dispute to the appellant.

Although no one has appeared on behalf of the respondents Nizam and residents of Nu-Lite Colony who were original petitioners before the learned Single Judge, but Shri Sanjay Pareek, appearing on behalf of the Jaipur Development Authority which has now decided not to challenge the judgment of the learned Single Judge and therefore withdraw the appeal filed against that judgment, has in substance supported the judgment of learned Single Judge. Shri Sanjay Pareek has produced before us the relevant

records of the JDA relating to the approval of the lay out plan submitted by the Housing Colony and allotment of the subject land in favour of the appellant. Shri Sanjay Pareek argued that the open space is defined in Rule 4(4) of the Rules 1975 to mean a park, garden, lawn or any other form of open space which is intended to be used by the public. Shri Sanjay Pareek submitted that though the allotment of the subject land was originally made to the appellant by the JDA but in view of the fact that allotment of land was made in favour of the Prem Shanti School which was situated just in front of the land in dispute and keeping in view the large size of the plot, the JDA has now decided to accept the direction contained in the judgment of learned Single Judge that the land in dispute should now be retained

only as open space meant for public park or garden. Shri Sanjay Pareek cited the judgment of this Court in Vaishali Nagar Vikas Samiti Vs. Superintendent of Police, Jaipur City & Ors., S.B. Civil Writ Petition No.6227/1992 decided on 9.11.1995 in which it was held that the purpose which is useful to public or any class or section of public is a public purpose and therefore setting up of a police station is also a public purpose because it works for maintenance of law and order and safety of the people which is so very essential in public interest. Referring to the records of the relevant time, Shri Sanjay Pareek submits that the lay out plan originally submitted by the Society was approved with certain modifications. The originally proposed facility area in the plan was not considered adequate and

therefore the Building Plan Committee upon hearing the members of the Housing Society and all concerned did not consider the open land admeasuring 2500 sq. yards which forms part of the disputed land as sufficient for park and therefore the adjoining land on which certain shops and residential plots were proposed to be set up was also included to be made part of open space / facility area and it was with this and few other modifications that the plan was approved. Shri Sanjay Pareek argued that another piece of land has since been allotted to the appellant in Padmavati Colony on the basis of undertaking given by its Secretary that the appellant does not have any other allotment in its name on concessional price being charged from them and that the allotment of the disputed land made in its

favour had been set aside by this Court by the impugned judgment. According to Shri Sanjay Pareek, when another piece of land has been allotted to the appellant on account of quashment of the allotment of the disputed land, the present appeal should be dismissed as having become infructuous because the purpose of appellant has already been sub-served with allotment of another land in lieu of the disputed land. He therefore prayed that the appeal be dismissed.

Since this was a public interest litigation on the basis of a letter petition and the learned Single Judge had the benefit of hearing arguments of amicus curiae appointed by the Court for residents of the locality, it would be to our advantage if we notice those arguments in our judgment too because we do not have

the advantage of hearing any one on behalf of residents of that locality who perhaps might have by now lost interest in the matter because almost fourteen years have gone by since the impugned judgment was passed and seventeen years when the said public interest litigation was entertained. On perusal of the impugned judgment, we find that the case which was set up on behalf of the writ petitioners before the learned Single Judge was that the subject land could not be allotted by the JDA to a private person or a private body for setting up a school. It was argued that already towards the north of the disputed land their exist a public school in the name of Prem Shanti Public School which caters to the needs of the children of that area. The land in question was left as an open space meant

only for a park or to be used for the purpose of national festivals and religious functions held by residents of the locality. Action of the JDA in making the impugned allotment to the appellant was malafide besides being without jurisdiction. This amounted to depriving the residents of the locality from the benefits of an open space. It was also contended that this Court had on 1.6.89 passed the stay order restraining the JDA from making the allotment of the disputed land, yet the JDA proceeded to make such allotment to the appellant without seeking either vacation or modification of the said stay order. It was argued that when the open space was intended to be used for public at large, it vests in the public and not in the JDA, which was acting only as a custodian of such land on behalf of

the pubic to look after and maintain the same. Such open land was meant for being used by the public as a park, garden or play ground by children of the area. The JDA committed illegality in changing the use of the land by making its allotment to a private person / body for construction of a school. Residents of the locality had right to use, protect and preserve an open space meant for public park, garden and lawn for ventilation and recreation activities. Allotment of the subject land to the school was made against wishes and requirements of the residents of the locality. Such allotment was made even without asserting the wishes of the Housing Society.

These were in substance the arguments raised before the learned Single Judge which formed basis for his proceeding to

decide the matter although while also taking into consideration the arguments raised by the parties opposite and various precedents, mostly of the Hon’ble Supreme Court, on the subject.

First and foremost, we shall deal with the argument raised on behalf of the appellants objecting about the locus standi and bona fides of the petitioners.

We upon careful perusal of the judgment passed by learned Single Judge find that the learned Single Judge held the writ petition registered on the letter petition maintainable because he maintained that residents of the locality were adversely affected by action of the JDA which deprived them of the facilities reserved for enjoyment and protection of the health and therefore, their insistence on preserving open space meant for

public park, garden or children play ground in the duly sanctioned scheme having statutory character. The learned Single Judge while repelling the objection of lucus standi relied on several judgments of the Hon'ble Supreme Court including the celebrated judgments of S.P. Gupta Vs. UOI, AIR 1982 SC 149 and of Mumbai Kamgar Sabha Vs. Abdulla Bhai, AIR 1976 SC 1455. In the facts of the case particularly when the JDA itself having seen the reason in what has been held by the learned Single Judge and withdrawn from the appeal, we hardly find any merit in the same argument relating to maintainability being reiterated before us questioning locus standi and bona fides of the petitioners. We therefore reject the argument by holding that the learned Single Judge was right when he also

overruled such objection.

Adverting now to the merits of the case, we find from the records which have been placed for our perusal by the learned counsel representing the JDA that the case of the Housing Society for conversion of the land under the Rajasthan Land Revenue (Allotment, Conversion & Regularisation of Agricultural Land for Residential and Commercial Purposes in Urban Areas) Rules, 1981 was processed on the basis of their application dated 24.3.1982. The Additional Collector (Land Conversion) by his letter dated 17.5.82 called for the comments of the Chief Town Planner who by his communication dated 9.8.1982 while according conditional consent for approval of the proposed lay out plan suggested changes in the dimension of various plots and apart from other measures, also

suggested that since no open space has been left in the Colony, Plot No.B-16 to 21 may not be converted and should be kept as open space and size of certain other adjoining plots was proposed to be reduced so as to accommodate the allottees of these six plots. The Chief Town Planner also objected that proposed sub-division design does not meet the standards as per the Rules 1975 regarding open space, facilities and road, therefore, relaxation in these rules was also be necessary. The Additional Collector while passing the provisional conversion order dated 18.2.93 approved the proposal for keeping the lands covered by Plot No.B-16 to B-21 as open land and reduction in the size of other lands accommodate the allottees thereof. The matter was then placed before the Building Plan Committee in its meeting

held on 30.5.94 which was chaired by the Commissioner, JDA. Deliberations in the meeting were preceded by the inspection of the site by members of the BPC on 25.5.94 which approved the plan with an additional modification that the proposed shops close to the facility area should not be approved. It is this area which was eventually alloted to the appellant herein. On perusal of the proposed lay out plan as also the finally approved lay out plan which was placed before us by the learned counsel for the JDA, we found that the major part of the disputed land was originally shown as open space by the Housing Society but the BPC, when it approved the plan with modifications, expanded this open space by including therein the areas falling under thirteen proposed residential plots and four

proposed shops for which it did not grant approval.

Requirement of the Rules of 1975, specially Rule 7(iii)(a), however is that such areas should have been separately indicated as residential, commercial, parks and open spaces, educational, roads and streets etc. In fact Rule 13 specifically deals with open spaces meant for tot-lot and local parks and has given the minimum size with reference to the numbers of plots to which they would serve. Rule 14 pertains to educational facilities with specific reference being given to type of schools such as nursery, primary and secondary/higher secondary and the population of the area to which they will serve. Rule 16 refers to shops and commercial establishments giving the size thereof and the area to which they will

serve. Rule 18 pertains to the provision of roads. All these facilities, it cannot be denied, were meant for public utility and even if the use of roads is excluded therefrom, the other purposes can broadly be described as facilities to the residents of the colony. While the Rules of 1975 do not define the language of the terms such as facilities and amenities but it does define the open space in Rule 5 to mean a park, garden, lawn or any other form of open space which is intended to be used by the public. Section 2(2) of the Act of 1982 however define amenities and this definition is an inclusive definition which apart from others, also include open spaces, parks, recreational grounds and play grounds. Definition of amenities as provided for in Section 2(2) of the Act of 1982 is for the facility of reference

reproduced hereunder:-

> “2(2) `amenities' includes roads, bridges, any other means of communication, transport, streets, open spaces, parks, recreational grounds, play grounds, water, gas and electric supply and source of energy, street lighting, sewerage, drainage, conservancy, public works and such other utilities, services and convenience has the State Government in consultation with the Authority may, by notification in the Official Gazette, specify to be an amenity for the purpose of this Act.”

Section 2(17) of the Act of 1982 further defines `public purpose'. This again is an inclusive definition and includes any purpose which is useful to the public or any class or section of the public therein. The definition of `public purpose' is given in Section 2(17) which is also reproduced hereunder:-

> “2(17) `public purpose' includes any purpose which is useful to the public or any class or section of the public and the requirement of land reserved or designated in a plan, project or scheme or for any other purpose under this Act.”

The learned Single Judge on analysis of the entire law on the subject including the provisions contained in the Rules 1975 came to hold that the sanctioned plan under such Rules had statutory character and no deviation therefrom was permissible unless the plan was revised under Rule 32 on the grounds provided therein. It was held that in the scheme of the Rules, provision has been made for open space / spaces for parks and gardens etc. intended to be used by the public which form an altogether different category than the areas reserved for educational facility and other facilities.

This being the basic difference between two categories, the ownership of the land falling in the first category shall vest in the UIT and now the JDA after the approval of sub-division of plots as provided in sub-rule (2) of Rule 30 but the ownership of the plots reserved for educational facilities and any other facilities falling in the second category remains with the developer. It is the lands of the later category which the developer can transfer to any person or body for the purpose of setting up a school. But the open spaces intended to be used by public in general stand dedicated to the public for common objective and must therefore remain with the State and its instrumentalities such as JDA, Municipal Board, Municipal Corporation or any other public authority. Such open

spaces cannot be allotted to any private person or body. Their use cannot be changed or converted by the JDA. It was therefore held that vesting of such areas in the UIT and for that matter, in the JDA is for the specific purpose of developing and maintaining them but this vesting does not give any absolute right to the JDA / UIT to sell out lands covered by such areas to private person or body.

What we have to therefore examine is whether the aforequoted conclusions arrived at by the learned Single Judge in the face of the law available on the subject and interpretation of the provisions of the Rules 1975 and the Act of 1982 are sustainable in law. Although Rule 30(2) of the Rules 1975 does provide that “as from the date of the approval of the sub-division by the Trust, ownership

of roads, parks and open spaces shall vest in the Trust” but such vesting by virtue of Rule 30(2) cannot be considered as absolute vesting in the sense of vesting of other lands available at the disposal of the JDA. Such vesting being consequence of the approval of sub-division, reconstitution and improvements of the plots under the Rules of 1975 and consequential approval of the lay out plan by the JDA, has to be taken as a vesting conditioned by the specific provisions contained in such Rules. In our considered view, the JDA has not been correctly following the Rules of 1975 while approving the lay out plans for sub-division, reconstitution and improvement of plots by broadly putting different utilities and amenities under the heading of `facilities'. When the Rules of 1975

specifically require the different uses being specifically indicated in the lay out plan as residential, commercial, parks and open spaces, educational, roads and streets and other uses such as schools, shops and other public amenities like water, surface drainage, sewerage, electric lines, the earmarking of such amenities areas collectively as facilities would be simply acting contrary to the intention of the Rules and betraying the faith reposed by the legislature / the rule making authority. The rule making authority has taken pains by requiring to not only separately indicate the lands meant for different utilities and amenities but has gone to the extent of even prescribing the minimum size with reference to the number of plots, the size of the area and the population to which

such amenities would cater. This can be illustrated from Rule 13 of the Rules of 1975 where the minimum of 650 sq.mtrs open space was required to be earmarked for tot-lot with minimum dimension of 18 mtrs / 60 feet on one side and such area would serve to 30-40 plots in an area having the radius of 195-240 mtrs (650-800 feet). In the same Rule 13, minimum size of local park has been indicated to be 3,000 sq.mtrs (3,630 sq.yards) with minimum dimension of one side being 45 mtrs. (150 feet) which would cater to the needs of 200-250 plots in an area having the radius of 360-450 mtrs. (1200-1500 feet). Similar parameters have also been given for educational facilities such as nursery school, primary school, secondary and higher secondary school in Rule 14 of the Rules where the rule making authority has

indicated the area and population to which such school shall serve. For example a nursery school catering to the needs of 1500 population living within the radius of 180-240 mtrs (600-800 feet) shall have 0.2 to 0.4 hectares of land preferably adjoining an open space or tot lot. Similar parameters have been given in regard to primary schools where for a population of 4000 living in the radius of 360-480 mtrs. (1200-1600 feet) would have 06. to 1.2 hectares of land preferably adjoining local park. For a secondary / higher secondary school for population of 10000 to 12000 living within the radius of 750 mtrs (2500 feet) an area of 2-2.8 hectares shall be recommended preferably adjoining local park. Similarly Rule 16 has also prescribed similar parameters with regard to small shops, small kiosk,

general shops, shops cum residence, shops cum office and godown etc. We have given reference to some of these rules to show that the rule making authority has taken a meticulous care to ensure that in the matter of sub-division, reconstitution and improvement of plots. The JDA has however followed these rules more in breach while approving the lay out plan of the housing colony in question.

When originally substantial part of the land in dispute was proposed as open space by the Housing Society, how could the BPC approve such lay out plan by earmarking the five pieces of lands including the land in dispute only as facility areas? Rule 7(1) of the Rules of 1975 provides that every application for the sub-division, reconstitution or improvement of plots shall be accompanied

by key map, survey map and lay out plan.

Rule 7(1)(iii) which pertains to lay out plan in its clause (a) pointedly mentions that “(a) Reference to the various uses of land proposed in the scheme shall be made in the form of Schedule (Land use Schedule) in the drawing, clearly indicating the areas under Residential, Commercial, Parks and Open Spaces, Educational, Roads and Streets, and other uses, and their percentages in relation to the total land area.” Clause (b) further provides that “Reference to various sizes of plots with their setbacks, as proposed in the scheme shall be made in the form of Schedule (Schedule of Plots) in the drawing.” Clause (c) further provides that “Reference to rights to way of roads with the width of the pavement and their

lengths as proposed in the scheme shall be made in the form of a Schedule (Schedule of Roads) in the drawing.” Clause (d) refers to open spaces, whereas clause (e) refers to other uses such as schools, shops and other public amenities. Clause (f) refers to the services such as water, surface drainage, sewerage, electric lines etc. On perusal of Rule 13, we find that this rule specifically deals with open spaces such as tot lot and local park. Rule 14 refers to educational facilities. Similarly upon glancing again at the provisions of Rule 7(1)(iii) (d) & (e) we find that open space has been independently referred to in clause (d) whereas schools, shops and other amenities have been included separately in clause (e) thereof. Emphasis of Rule 13 therefore is that there shall be earmarking

of the open space for the purposes of tot-lot and local parks whereas Rule 14 has given such requirement of separate earmarking of the plots for educational buildings in the category of nursery school, primary school, secondary / higher secondary school. Rule 16 has also provided for the earmarking of separate categories of commercial establishments. Rule 15 is general in nature which refers to other facilities by providing that any other facility that may be deemed necessary in an area shall be adequately provided by the trust (now JDA) from time to time. So a purpose which has been specifically dealt with in Rule 13, 14 and 16 obviously could not be included in residuary provision like Rule 15 which provides for any other facility which by necessary implication excluded the

facilities which have been specifically included elsewhere in the rules.

When the land in dispute was proposed as open space and when the lay out plan was approved by the JDA with addition of certain more area of land by disapproving the proposed construction of shops / residential plots, this necessarily would be taken as the land meant for open space because no specific approval was then given for setting up educational facilities in this land. An open space, includes only tot lot and local park. Defined by Rule 4(5), `Open space' means a park, garden, lawn or any other forum of open space which is intended to be used by the public. Merely because this area at the time of approval was indicated as facility area would not by virtue of Rule 30(2) of the rules

stand unconditionally vested in the JDA. Vesting of the land would be conditional with the attached obligation of developing, maintaining and protecting such areas for the purpose they were earmarked under the approved plan. The JDA, as has been rightly held by the learned Single Judge, has no power under the Rules or for that matter under the Act, to part with such land by transferring it in favour of any private person or body of private persons such as the appellant society. The JDA holds such land in trust on behalf of public at large. The land which is proposed as open space and approved as such stands dedicated to the people and the JDA would not have any legal right to dispose it of just like any other land that may be available to it for the purpose of

disposal under the Rajasthan Improvement Trust (Disposal of Urban Land) Rules, 1974. Although, generally speaking, education is also a public purpose but we are not inclined to agree with the learned counsel for the appellant that the allotment of land to the appellant for setting up a school was also for a public purpose, because educational institution is also a public utility / facility. The JDA may have been persuaded to make allotment of such land on reserved / concessional price, but in the matter of allotment of such land to a private school, there would always be an element of commerce for such school would not provide free education to the residents of that area or any other area and would invariably be charging a sizeable amount as fees. Such purpose therefore cannot be

considered as a public utility in the same manner in which a public park, garden or a play ground, tot-lot or recreational grounds can be. We are therefore inclined to hold that if while approving the lay out plan the JDA has not indicated a specific purpose with reference to the specific rules such as park, garden, lawn, educational facilities, shops and commercial establishments, industrial areas, roads etc., approval of the lay out plan by merely describing a piece of land as facility area should necessarily be considered as open space meant for tot-lot or local park or for the purposes ancillary thereto, such as recreational grounds, play grounds, lawns or any other form in which such land can be used as open space where element of masonry construction thereupon is not involved.

Vesting of such land in the meaning of Rule 30(2) of the Rules 1975 does not bestow absolute title of the said land in the JDA which only holds such land in trust on behalf of the people at large to act as an authority to develop, maintain and protect such land for the purpose envisaged by the Rules. It holds such land as a trustee of the public and can make use of the same only for the purpose in conformity with original dedication and even if any variation is made, then only for a purpose analogous to the original purpose. We may in this connection usefully refer to a Division Bench judgment of this Court in Baljit Singh & Ors. Vs. State of Raj. & Ors., D.B. Civil Writ Petition (PIL) No.789/06 decided at Principal Seat of this Court vide judgment dated 12th January, 2007. It was a case in

which the Municipal Board, Pili Banga resolved to regularize a large number of encroachments of those who had constructed shops and the structures of allied nature in the midst of the roads. This Court while allowing the writ petition filed as a public interest litigation while referring to the power of the Municipal Board to regularize such encroachments made the following observations:-

> “We are, therefore, of the considered view that the portions of the land which were falling in the midst of the road and with regard to which the Board had been in litigation with the trespassers could not be considered as additional or surplus land so as to be leased/sold out. This intention of the Legislature has further been reflected in the recently introduced section 80A inserted by Amending Act of 1999 in proviso to

which, the lands earmarked for public utilities/services have been completely kept out of the purview of regularization and the public utilities like public roads, highways and footpath, apart from several others, have been included in this category of exclusion. Whether the land may belong to the Board or it may be vested in it by the Government, in either of the categories, the Board acts only as a trustee especially of the lands of the public streets, footpath and pavements etc. which are held by it in trust on behalf of the public at large. Public roads and the lands covered thereunder are in the form of dedication to the public which it is entitled to use to the extent of original dedication. Such land can not be alienated in any manner whatsoever except when part of it has become surplus and therefore unuseful as public road. The Board cannot therefore part with possession of such land and in no

> case on permanent basis by way of lease or sale or regularization or otherwise as has been done in the present case. Such a transaction being not in conformity with the provisions of the Act would clearly be hit by first proviso to section 80(1) of the Act of 1959 and would, therefore, be liable to be annulled.”

Learned Single Judge while allowing the writ petition relied on the judgment of Hon'ble Supreme Court in Bangalore Medical Trust Vs. B.S. Muddappa & Ors., (1991) 4 SCC 54 and we would also derive benefit from the said judgment which still holds field and in our considered view, is of great relevance even in the present times. Observations made by their Lordships in para 36 are worth quoting:-

> “Public park as a place reserved for beauty and recreation was

developed in 19th and 20th century and is associated with growth of the concept of equality and recognition of importance of common man. Earlier it was a prerogative of the aristocracy and the affluent either as a result of royal grant or as a place reserved for private pleasure. Free and healthy air in beautiful surroundings was privilege of few. But now it is a, `gift from people to themselves'. Its importance has multiplied with emphasis on environment and pollution. In modern planning and development it occupies an important place in social ecology. A private nursing home on the other hand is essentially a commercial venture, a profit oriented industry. Service may be its motto but earning is the objective. Its utility may not be undermined but a park is a necessity not a mere amenity. A private nursing home cannot be a substitute for a public park. No town planner would prepare

a blueprint without reserving space for it. Emphasis on open air and greenery has multiplied and the city or town panning or development Acts of different States require even private house owners to lease open space in front and back for lawn and fresh air. In 1984 the B.D. Act itself provided for reservation of not less than 15 per cent of the total area of the layout in a development scheme for public parks and playgrounds the sale and disposition of which is prohibited under Section 38-A of the Act. Absence of open space and public park, in present day when urbanization is on increase, rural exodus is on large scale and congested areas are coming up rapidly, may give rise to health hazard. May be that it may be taken care of by a nursing home. But it is axiomatic that prevention is better than cure. What is lost by removal of a park cannot be gained by establishment of a nursing home.

> To say, therefore, that by conversion of a site reserved for low lying park into a private nursing home social welfare was being promoted was being oblivious of true character of the two and their utility.”

Under challenge before the Supreme Court in Banglore Medical Trust was the judgment of Division Bench by which the decision of the Banglore Development Authority in converting the site of a private park into a nursing home and then allotting the same to Banglore Medical Trust was set aside. The Hon'ble Supreme Court while upholding the judgment of the Division Bench in para 48 of the judgment held as under:-

> “Much was attempted to be made out of exercise of discretion in converting a site reserved for amenity as a civic amenity. Discretion is an effective tool in

administration. But wrong notions about it results in ill-conceived consequences. In law it provides an option to the authority concerned to adopt one or the other alternative. But a better, proper and legal exercise of discretion is one where the authority examines the fact, is aware of law and then decides objectively and rationally what serves the interest better. When a statute either provides guidance or rules or regulations are framed for exercise of discretion then the action should be in accordance with it. Even where statutes are silent and only power is conferred to act in one or the other manner, the Authority cannot act whimsically or arbitrarily. It should be guided by reasonableness and fairness. The legislature never intends its authorities to abuse the law or use it unfairly. When legislature enacted sub-section (4) it unequivocally declared its

intention of making any alteration in the scheme by the Authority, that is, BDA and not the State Government. It further permitted interference with the scheme sanctioned by it only if it appeared to be improvement. The facts, therefore, that were to be found by the Authority were that the conversion of public park into private nursing home would be an improvement in the scheme. Neither the Authority nor the State Government undertook any such exercise. Power of conversion or alteration in scheme was taken for granted. Amenity was defined in Section 2(b) of the Act to include road, street, lighting, drainage, public works and such other conveniences as the government may, by notification, specify to be an amenity for the purpose of this Act. The Division Bench found that before any other facility could be considered amenity it was necessary for State Government to issue a

notification. And since no notification was issued including private nursing home as amenity it could not be deemed to be included in it. That apart the definition indicates that the convenience or facility should have had public characteristic. Even if it is assumed that the definition of amenity being inclusive it should be given a wider meaning so as to include hospital added in clause 2 (bb) as a civic amenity with effect from 1984 a private nursing home unlike a hospital run by government or local authority did not satisfy that characteristic which was necessary in the absence of which it could not be held to be amenity or civic amenity. In any case a private nursing home could not be considered to be an improvement in the scheme and, therefore, the power under Section 19(4) could not have been exercised."

The law as enunciated by their

Lordships in the Banglore Medical Trust (supra) when applied to the facts of the present case, we are clear in our mind that the land left as open space could not be allotted for setting up a school on the belief that the allotment of a school is also a public utility. The judgment passed by the learned Single Bench of this Court in Vaishali Nagar Vikas Samiti on which reliance was placed by learned counsel for the JDA can have no application to the facts of the present case where the land was originally reserved for institutional purpose and was thereafter alloted for construction of a community hall and thereafter alloted for the purpose of constructing the building of police station. The learned Single Judge in the facts of that case, therefore distinguished the judgment of the Hon'ble

Supreme Court in Banglore Medical Trust as also the impugned judgment and held that legislature has made a distinction between the open space and other spaces reserved for public purpose, thus implying that an open space could not be allotted for construction of a police station but did not make any interference because it was reserved only for construction of a community hall and then allotted for construction of police station.

It is trite law that the environmental factors should weigh heavily with all concerned including the Courts while construing a town planning statute. While therefore interpreting various provisions of the Rules 1975 it should be ensured that outcome does not have the effect of marginalizing the ecological considerations. Reservation of the open

spaces for parks and play grounds is universally recognized legitimate exercise of statutory powers rationally related to the protection of the residents of the locality from the ill effects of urbanization. Their Lordships in Banglore Medical Trust rightly stated that “statutes in force in India and abroad reserving open spaces for parks and playgrounds are the legislative attempts to eliminate the misery of disreputable housing condition caused by urbanization. Crowded urban areas tend to spread disease, crime and immorality.” It is harmonious development with enforcement that has given rise to the concept of urban development. Urban development is a process in which though the benefits of development may be derived but efforts are made to stay immune from its ill effects.

Their Lordships of Hon'ble Supreme Court in Intellectual Forum, Tirupathi Vs. State of A.P. & Ors. (2006) 3 SCC page 549 has beautifully put the law on the subject, which reads as under:-

> “The world has reached a level of growth in the 21st century as never before envisaged. While the crisis of economic growth is still on, the key question which often arises and the courts are asked to adjudicate upon is whether economic growth can supersede the concern for environmental protection and whether sustainable development which can be achieved only by way of protecting the environment and conserving the natural resources for the benefit of humanity and future generations could be ignored in the garb of economic growth or compelling human necessity. The growth and development process are terms without any content, without an inking as to the substance of

their end results. This inevitably leads us to the conception of growth and development which sustains from one generation to the next in order to secure “our common future”. In pursuit of development, focus has to be on sustainability of development and policies towards that end have to be earnestly formulated and sincerely observed. As Prof. Weiss puts it, “conservation, however, always takes a back seat in times of economic stress.” It is now an accepted social principle that all human beings have a fundamental light to a healthy environment, commensurate with their well being, coupled with a corresponding duty o ensuring that resources are conserved and preserved in such a way that present as well as the future generations are aware of them equally.”

In Municipal Corporation, Ludhiana

& Anr. Vs. Balinder Bachan Singh (dead) by LRS. & Ors., 2004 (5) SCC 182 the dispute was regarding open spaces earmarked for developing the parks used by the inhabitants of the locality. The scheme was approved by the Municipal Corporation under the Punjab Municipal Act, 1911. When the scheme had been approved and duly developed and the open space was being used by the inhabitants, the respondent filed a suit claiming the said land, which was dismissed. Appeal thereagainst was allowed by the first appellate Court. The Municipal Corporation went in appeal to the Supreme Court against that judgment. The Hon'ble Supreme Court again in para 18 of the judgment held as under:-

> “Rajinder Kaur and the plaintiff-respondents could not have sold the land without getting the Scheme sanctioned as plots. It is well

known and judicial notice can be taken of the fact that residential plots sell at a much higher price than the agricultural land. To sell the land as plots, a part of the land has to be left to provide for common purposes such as roads, community centre, schools and parks. Having taken advantage of selling the plots in a developed colony and charging a higher price, which were purchased by the inhabitants with the understanding that civil amenities including the park were well-provided-for, the plaintiff-respondents cannot be permitted to turn around to claim the land left in the Scheme for being used as a part at their personal property."

In Padma Vs. Hiralal Motilal Desarda & Ors., (2002) 7 SCC 564, the Hon'ble Supreme Court while explaining the paramount consideration / utilisation of the land reserved in future in accordance

with the requirement of the later times, criticized the approach of the City and Industrial Development Corporation, Maharashtra and held that it was supposed to carry out its activities “on no profit no loss basis”. While upholding the order of the High Court, it was held that the decision to dispose of the land in bulk cannot be said to have been taken in public interest and High Court rightly observed in the judgment that “local residents and children must have place enough to be used as parks, gardens and for entertainment which not only act as lungs and ventilators for the suffocating growth of pollution but also add luster and beauty to the township. The utility of such piece of land acting as a buffer for maintaining ecological balance and environmental demand needs no emphasis”.

In fact their Lordships while explaining the concept of town planning had made some very good observations to make in para 31 and 32 which we are tempted to incorporate hereunder for the purpose of guidance:-

> “31. Laws dealing with development planning are indispensable to sanitation and healthy urbanisation. Development planning comprehensively takes care of statutory, manual, administrative and land-use laws hand in hand with architectural creativity. In the words of a well known architect, development planning is the DNA of urbanization – the genetic code that determines what will get built. A development plan is essential to the aesthetics of urban society. American Jurisprudence, 2d (Vol. 82, at p. 388) states:
>
> > “`Planning', is that term is used in connection with community development, is a generic term, rather than a

> word of art, and has no fixed meaning. Broadly speaking, however, the term connotes the systematic development of a community or an area with particular reference to the location, character, and extent of streets, squares, and parks, and to kindred mapping and charting. Planning has in view the physical development of the community and its environs in relation to its social and economic well-being for the fulfillment of the rightful common destiny, according to a `master plan' based on careful and comprehensive surveys and studies of present conditions and the prospects of future growth of the municipality, and embodying scientific teachings and creative experience."

32. The significance of a development planning cannot therefore be denied. Planned development is the crucial zone that strikes a balance between the needs of large-scale urbanization and individual building. It is the science and aesthetics of urbanization as it saves the development from chaos and uglification. A departure from

> planning may result in disfiguration of the beauty of an upcoming city and may pose a threat for the ecological balance and environmental safeguards."

Their Lordships of Supreme Court in recently delivered judgment in Bombay Dyeing and Manufacturing Co. Ltd. (3) Vs. Bombay Environmental Action Group & Ors. held that "ecological factors indisputably are very relevant considerations in construing a town planning statute. The Court normally would lean in favour of environmental protection in view of the creative interpretation made by this Court in finding a right of environment protection including the right to clean water, air etc. under Article 21 of the Constitution." Their Lordships in para 100 of this judgment observed that "both open space as also the other factors relevant

for making the regulation would be in public interest. The question would, however, be as to which is of greater public interest. The public interest, thus, would be a relevant factor also for interpretation of the statute. Pubic interest so far as maintenance of ecology is concerned pertains to a constitutional scheme comprising Articles 14, 21, 48-A and 51-A (g) of the Constitution, the other factors are no less significant."

Taking a holistic and pragmatic view of the matter, we find that the conclusions arrived at by the learned Single Judge are perfectly in keeping with the salutary principles of law laid down by their Lordships of Hon'ble Supreme Court in very many cases while interpreting various town planning laws. It is of utmost necessity that the

respondent JDA in discharging all its obligations of planning and development of the city of Jaipur give due importance to the provisions envisaged in the Rules of 1975 and the Act of 1982 and in doing so, mandatorily adhere to the requirement of sufficient spaces being left open to be used as parks, gardens, playground and recreational grounds for their entertainment and health activity of the local residents and especially the children. Such utilities have been broadly categorized as open spaces in the definition clause contained in Rule 4(5) of the Rules of 1975. Such open spaces act as lungs and ventilators for the suffocating growth of population and as rightly observed by their Lordships in Padama (supra), also add luster and beauty to the township. These open spaces of land

have immense importance and utility as buffer zone for maintaining ecological balance and fulfilling environmental demands.

In our considered view, therefore, the judgment passed by learned Single Judge does not suffer from any legal infirmity. Both the appeals are therefore dismissed with no order as to costs.

**(Mohammad Rafiq),J.** **(S.N.Jha),CJ.**

RS/-